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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

RECORD NO. 617

L & M REALTY CORPORATION, a Virginia Corporation, Alleged Bankrupt,

Petitioner

v.

RENA C. LEO, Executrix of the Estate of Dr. Louis S. Leo, Deceased, Petitioning Creditor,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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THE RELIANCE PRESS OF NORFOLK, VA., INC.

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QUESTION PRESENTED

Whether the alleged bankrupt committed an act of bankruptcy by paying in full and while insolvent two bank notes made by it and endorsed by its two sole stockholders, the said stockholders being bona fide creditors for advances made to it and the only other creditors of the alleged bankrupt.

STATEMENT

On August 12th, 1954, within four months of the filing of the involuntary petition of bankruptcy and while insolvent, the L & M Realty Corporation paid to the National Bank of Commerce the sum of $9,000.00 and to the Seaboard Citizens Bank the sum of $5,000.00, which payments satisfied in full the existing obligations of the Corporation to these two banks. The notes evidencing these obligations of the L & M Realty Corporation to the banks were endorsed personally by Dr. Louis S. Leo, respondent's decedent and Dr. Edward Myers, the two principal owners of the Corporation, they being also officers and directors. At the time of said payments to the bank, the estate of Dr. Louis S. Leo was a creditor of the Corporation in the amount of $17,501.85 and Dr. Edward Myers was a creditor of the Corporation in a similar amount or more.

It was also stipulated for the sole question of whether or not a preference had been effected by the payment to the banks, that the Corporation had no other creditors except the two banks and the two principals, the estate of Dr. Leo and Dr. Edward Myers. The indebtedness of the two principals were bona fide debts over and above the capital invested in the Corporation and were genuine advances made to the Corporation. The Leo estate is insolvent.

REASONS FOR NOT ALLOWING THE WRIT

1. Petitioner states in its first alleged reason for allowing the writ that the decision of the Fourth Circuit in the instant case is in direct conflict with *In re Harpke,* 116 Fed. 295 (7th Cir. 1902) which the Sixth

and Eighth Circuits refused to follow in *Livingstone v. Heineman,* 120 Fed. 786 (6th Cir. 1903) and *Swartz v. Fourth National Bank,* 117 Fed. 1 (8th Cir. 1902).

It is to be assumed from this argument of petitioner that it is its contention that the Harpke case sustains its position and should be followed. Yet this is a misleading proposition. Petitioner does not rely upon the Harpke case. In petitioner's brief before the Fourth Circuit at the bottom of page seven (7) petitioner says: "However, we do not consider this case (*In re Harpke*) in point or remotely helpful to a solution of the issues before us." Again in the second paragraph of page eight (8) of that brief, petitioner added: "In the Harpke case the Court held that the payment of the endorsed note to the bank created no preference because the endorsed note occupied a different "class" from the unendorsed note. We make no such contentions in the case at bar, and we do not agree with the conclusions reached in the Harpke case."

Thus petitioner does not think that this court should rule in his favor on the basis of the Harpke case. Neither the dissenting opinion in the Court below, nor the District Court opinion nor the referee in bankruptcy's ruling follow the Harpke case, although said opinions and ruling were in favor of petitioner.

Respondent therefore respectfully submits that petitioner is thus attempting to raise a false conflict of decisions in its quest for a Writ of Certiorari.

2. In its second alleged reason why the writ should be allowed, petitioner contends that while the Court below apparently followed the decision of *Swartz v. Fourth National Bank,* supra, it refused to

follow the equitable principle of estoppel therein enunciated.

But the opinion of the Court below clearly and decisively explained why this principle was not applicable to the instant case. (See Appendix A of Petition, p. 4). In the Swartz case the court estopped the endorser from obtaining a dividend from the bankrupt upon that portion that it paid to the note holder by virtue of its endorsement until the holder of the note had recovered its claim in full. In the instant case respondent is not claiming to be a creditor merely because of her decedent's endorsement. She is asserting a valid, bona fide, independent claim.

The fourth and fifth alleged reasons why petitioner should be allowed a writ are similar to each other and the same as set out in petitioner's second reason, indicative of petitioner's weak position by attempting to stretch nothing into something.

The fourth reason calls the decision below in conflict with this Court's opinion in *Pepper v. Litton,* 308 U. S. 295 (1939) (See Petition, p. 5). But the opinion of the lower court effectively distinguishes the *Pepper* case which dealt with a fraudulent claim asserted by the stockholder; here the *bona fides* of respondent's debt was stipulated by petitioner. (See Petition, Appendix A, p. 4). Not even the dissenting opinion in the Court below claimed that the majority opinion was in conflict with *Pepper v. Litton.*

The alleged fifth reason of petitioner is identical with its second reason except it cites different cases than that previously cited by it. But again respondent wishes to point out, as did the Court below, that the estoppel

theory of the cases cited estopped a claim on the endorsement until the holder had been made whole. Here the claim is an independent one and no estoppel should arise.

Therefore respondent respectfully submits that not only was the Court below plainly correct but also the equitable principles alluded to are not applicable to the instant case.

3. In answer to petitioner's third alleged reason why the writ should be allowed, respondent respectfully submits that the issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on Certiorari. It is to be noted that there are no cases in point to be found for either side. This is a clear refutation of petitioner's assertion that "this case is . . . of importance to the administration of the Federal Bankruptcy Laws." (Petition, page 6). It is true as stated by petitioner that this Court has not to date had a single case defining "creditor of the same class" at issue in this case. That probably is because the opinion of Judge Sanborn in *Swartz v. Fourth National Bank,* supra, decided in 1902, followed in *Livingstone v. Heineman,* supra, decided in 1903 and In re *Star Spring Bed Co.,* 257 Fed. 176 (D.N.J. 1919), defined "creditor of the same class" so conclusively that never again was its definition in doubt.

In addition thereto the facts in the instant case are extremely unique; not one case has petitioner cited in point in the many thousands arising under the bankruptcy laws. This fact completely belies petitioner's statement that "settlement of the question presented by

this petition is obviously in the public interest, since it is likely to be presented in almost every bankruptcy proceedng affecting closely held corporations." Petitioner is grasping at straws when it attempts to convert a correct decision in a highly unique factual situation into an important question of Federal law, when in fact it has never arisen since the enactment of the Bankruptcy Act and will likely never arise again.

CONCLUSION

For the foregoing reason, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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I, Norris E. Halpern, Counsel for Petitioner, do hereby acknowledge that a copy of the foregoing brief for respondent in opposition to a Writ of Certiorari was duly served upon me by delivery of the same to me by counsel for respondent this 30th day of January, 1956.

NORRIS E. HALPERN,

Counsel for Petitioner